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No. 84-1485

In The

Supreme Court of the United States

October Term, 1985

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I. THE RESPONDENT'S ARGUMENT THAT HIS THREE CONFESSIONS SHOULD BE SUPPRESSED SOLELY ON THE GROUND THAT THE POLICE LIED TO OR DECEIVED HIS LAWYER HAS NO FACTUAL OR LEGAL BASIS.

Respondent's first argument (Respondent's Brief [hereinafter R.B.] 11-21) is that this Court need not resolve the question presented in the petition for writ of certiorari because respondent's confession should be suppressed on the ground that "the police lied [to] or deceived [respondent's] lawyer" (R.B. 9). This argument lacks both factual and legal support.

First, notwithstanding respondent's repeated assertions that the police officers acted dishonestly (see, *e.g.*, R.B. 9, 15, 20), there is no finding below that the police intentionally deceived respondent's attorney. The Supreme Court of Rhode Island observed that the state trial justice found "no collusion or conspiracy" among the police to conceal respondent from his attorney (Pet. App. 50). Even the court of appeals concluded only that the police acted "deliberate[ly] *or reckless[ly]*" (*id.* at 15 (emphasis added)).

But, assuming arguendo, that the police officers did intentionally deceive respondent's attorney, that fact by itself does not establish a violation of respondent's constitutional rights. This Court never has held that the Constitution supplies a remedy whenever the police act in subjective bad faith. It is elementary that government conduct must infringe a right protected by the Constitution before that conduct can be held to violate the Constitution, and respondent does not point to any authority

supporting his view that a misrepresentation by a government officer amounts to a per se constitutional violation requiring the suppression of lawfully-obtained evidence.[1] He bases his position solely upon the fact that a defense attorney is an officer of the court, but that truism provides absolutely no support for the conclusion that any misrepresentation by a police officer to a defense attorney constitutes a constitutional violation.[2] Moreover, as discussed below, the police officers were not required to allow the attorney to talk to respondent. The officers' subjective intent therefore is completely irrelevant.[3]

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[1] Respondent relies upon this Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), but in that case the Court held that the administration of *Miranda* warnings did not render admissible the statement of a defendant who previously had been arrested in violation of the Fourth Amendment. The flaw in respondent's analogy is that respondent cannot show a prior constitutional violation equivalent to the arrest of the defendant in *Brown*. There accordingly is no basis for suppressing the confessions here.

Even amicus American Bar Association acknowledges in its brief supporting respondent (R.B. 9 n.5) that the subjective intent of the police is not revelant in determining whether respondent's confessions should be suppressed.

[2] The lawyer, of course, is not a party to the proceeding, and any right she might have had not to be deceived is not in issue.

[3] Respondent cites (R.B. 20-21) Kamisar, "Brewer v. Williams, Massiah *and* Miranda: *What is 'Interrogation'? When Does It Matter?,*" in Police Interrogation and Confessions, (1980), but he fails to note that the author rejects the rule espoused by respondent (*id.* at 220-224).

II. RESPONDENT IMPROPERLY ARGUES THAT HE IS ENTITLED TO MORE INFORMATION THAN THAT PRESCRIBED BY THE COURT IN MIRANDA v. ARIZONA IN ORDER TO VALIDLY WAIVE HIS MIRANDA RIGHTS.

Respondent does not dispute that the police read him the warnings prescribed by this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), and he does not contend that he failed to understand those warnings.[4] He asserts instead (R.B. 21-26) that the waivers of his *Miranda* rights were invalid because he was not supplied with information relevant to his decision whether to waive his rights. However, the inquiry in assessing the validity of a *Miranda* waiver is whether the suspect understood that he had a right to refuse to answer the officer's questions and a right to counsel. *Fare v. Michael C.,* 442 U.S. 707, 725 (1979); *North Carolina v. Butler,* 441 U.S. 369, 374-375 (1979). It simply is immaterial that some additional piece of information might make a suspect more or less willing to waive his rights. Indeed, if the police were required to supply suspects with all such information, police interrogation would be eliminated as a weapon in the fight against crime. A police officer would almost never be able to obtain a valid waiver because it would be virtually impossible for the officer to ascertain which information he would be required to provide to the suspect.

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[4] Respondent refers to his lack of education and unfamiliarity with the criminal justice system (R.B. 22, 23-24), but he nowhere claims that he did not understand the warnings.

III. RESPONDENT MISCONCEIVES HIS FIFTH AND SIXTH AMENDMENT RIGHT TO COUNSEL.

Respondent and amici also argue that the confessions should be suppressed on the somewhat different theory that the police officers' actions violated respondent's right to counsel under the Fifth and Sixth Amendments because the officers interfered with the relationship between respondent and his attorney. These arguments are found upon a complete misconception of the relevant Fifth and Sixth Amendment rights. In fact, defense counsel has no constitutionally-guaranteed right of access to a suspect prior to the commencement of judicial proceedings against the suspect.

a. The "right to counsel" announced in *Miranda* does not flow directly from the Fifth Amendment; it is a "procedural safeguard" designed to protect a suspect's Fifth Amendment privilege against compelled self-incrimination. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). The scope of the "right" accordingly must be determined by reference to the privilege against self-incrimination that is its only source. The *Miranda* Court stated that a suspect "has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege [against self-incrimination]" established in that case (384 U.S. at 471). Equally significant, however, is the principle that a suspect may waive his *Miranda* rights without consulting an attorney (*Id.* at 475, 479). Indeed *Miranda* plainly does not guarantee a suspect the right to consult with counsel in all circumstances, but recognizes the right only in the context of custodial interrogation. Accordingly, a suspect

who requests counsel need not be provided with an attorney if the police decide to terminate the interrogation (*id.* at 474). Thus, the Fifth Amendment "right to counsel" is limited to the circumstance where a suspect requests the assistance of counsel in connection with police interrogation and the police elect to continue the interrogation.[5]

The argument that respondent should have been permitted to consult with counsel or should have been informed of the attorney's inquiry is grounded in the notion that the Fifth Amendment right to counsel during police interrogation is as broad as the Sixth Amendment right to counsel that attaches only upon the commencement of adversary proceedings (*United States v. Gouveia*, 104 S. Ct. 2292 (1984)). However, as discussed above, the Fifth Amendment right is quite limited, applying only where needed to protect the privilege against self-incrimination.[6] The justification for requiring the police to per-

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[5] Here, respondent was informed that he had a right to remain silent and a right to consult with counsel and decided that he did not want the assistance of an attorney. Amicus argues that the attorney's inquiry should be construed as an assertion of respondent's *Miranda* rights (see ABA R.B. 12-13). However, *Miranda* leaves to the suspect, not the lawyer, the decision whether to assert these rights, and it is plainly correct in doing so, since the purpose of requiring warning and waiver regarding counsel is to facilitate assurance that the suspect's will has not been overborne—A matter as to which his attorney's wishes are entirely irrelevant.

[6] The broad Fifth Amendment right to counsel advocated by respondent and amici appears to be an attempt to avoid this Court's previous decisions construing the Sixth Amendment right to counsel. However, it is difficult to see why a Fifth Amendment right to counsel divorced from the privilege against self-incrimination would be any broader in scope than

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mit an attorney to consult with a suspect prior to police interrogation appears to be that the suspect is entitled to the advice of the attorney in deciding whether to waive his *Miranda* rights. Yet a suspect who has a lawyer on retainer or whose family has the presence of mind to retain an attorney probably is less likely than an unrepresented suspect to need such assistance of counsel; the fortuitous intervention of an attorney is thus an irrational dividing line for determining whether the assistance of counsel is needed to protect the privilege against self-incrimination. If consultation with an attorney is warranted to protect the privilege in this context, it is difficult to see why the advice of counsel should not be a prerequisite to obtaining a waiver of *Miranda* rights in all situations. Since *Miranda* itself indicates that consultation with an attorney is *not* necessary, there is no basis for imposing such a requirement in the present context.

This result does not mean that a suspect can be involuntarily subjected to prolonged incommunicado interrogation; it simply places suspects who happen to have lawyers on the same footing as suspects without lawyers. The suspect retains the authority to end an interrogation

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the Sixth Amendment right to counsel set forth in the text of the Constitution.

Relying on a footnote in *Miranda* (see 384 U.S. at 465 n.35), that in turn refers to *Escobedo v. Illinois*, 378 U.S. 478 (1964), amicus American Bar Association asserts that "the *Miranda* Court viewed police interference with communications between the suspect and counsel as unconstitutional" (R.B. 13). However, this Court has held that *Escobedo* in fact rested upon the Fifth Amendment privilege against self-incrimination (*United States v. Gouveia*, 104 S.Ct. at 2298) and the ABA's contention thus cannot be supported on the rational it advances.

at any time simply by invoking his Fifth Amendment rights. Moreover, the Federal Government, the States, and local government entities remain free to adopt rules governing attorney-client access during the pre-indictment period.

b. Despite this Court's determination in *United States v. Gouveia*, 104 S. Ct. at 2296, that "the [Sixth Amendment] right to counsel attaches only at or after the initiation of adversary judicial proceedings," respondent and amici argue that the police officers' actions violated respondent's Sixth Amendment rights. They assert that *Gouveia* concerned only appointed counsel and that where a suspect has an existing attorney-client relationship, the Sixth Amendment protects that relationship at all stages of a criminal proceeding.[7]

Although this Court's decisions concerning the Sixth Amendment principally relate to the right to appointed counsel, the Court has not distinguished between appointed and retained counsel. Aside from their assertions that the Sixth Amendment should provide some additional protection for existing attorney-client relationships, respondent and amici never articulate any justification for their position. This Court has concluded that "the 'core purpose' of the counsel guarantee is to assure aid at trial" or at certain " 'critical' pre-trial proceedings" (*United States v. Gouveia*, 104 S. Ct. at 2298). The Amendment thus does not provide any generalized protection for the attorney-client relationship so as to confer

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[7] Amicus American Bar Association recognizes that under this Court's decision in *Gouveia* the Sixth Amendment right to counsel does not apply to pre-indictment interrogations such as the interrogations at issue here (see R.B. 13).

special benefits upon suspects who happen to have an ongoing relationship with an attorney.[8]

IV. RESPONDENT WAS NOT DENIED THE FUNDAMENTAL FAIRNESS GUARANTEED HIM BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Finally, respondent asserts (R.B. 36-40) that the police officers' conduct deprived him of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. He argues that even if his confessions were voluntary and even if the police officers did not violate *Miranda's* prophylactic rules, the admission of the confessions into evidence was unfair. However, the rules set forth in *Miranda* were designed to ensure fair-

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[8] Respondent at first appears to argue (R.B. 30-32) that the Sixth Amendment right to counsel applies because an interrogation constitutes a critical stage of the criminal proceedings, but he later states that he "is not asking this Court to hold that the Sixth Amendment right to counsel attaches when the police subject a defendant to custodial interrogation" (R.B. 32). In any event, *Gouveia* makes clear that the right does not attach to preindictment interrogations such as the interrogations in the present case because respondent was not confronted with " 'the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law' " (104 S.Ct. 2298 (citation omitted)).

Respondent asserts (R.B. 32-33) that this Court's finding of a Sixth Amendment violation in *Brewer v. Williams*, 430 U.S. 387 (1977), rested in part on the fact that the police had represented to the defendant's lawyer that the defendant would not be interrogated. However, the Court several times noted that the defendant's Sixth Amendment right to counsel had attached because judicial proceedings had been initiated (see 430 U.S. at 398-399, 401). The inapplicability of the Sixth Amendment right to counsel in circumstances like the instant case was clearly recognized in *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980), and nothing in the Court's later jurisprudence provides any ground for altering that conclusion.

ness in police interrogations; it seems most unlikely that the officers' conduct could be fundamentally unfair if the confession was obtained in compliance with *Miranda*.

Respondent relies upon *Darwin v. Connecticut*, 391 U.S. 346 (1968). However, the defendant in that case was questioned for two entire days and "on three separate occasions sought and was denied permission to communicate with the outside world" (391 U.S. at 349). The Court reversed the conviction on the ground that the defendant's confession was not voluntary (*ibid.*). Here, by contrast, the courts below specifically found that respondent's confession *was* voluntary (Pet. App. 116, 67, 37). *Darwin* accordingly supplies no basis for finding a due process violation in this case.

CONCLUSION

For the foregoing reasons, and for such other reasons as appear in his Brief, the Petitioner prays that the judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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